Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF

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REPLY BRIEF FOR APPELLANTS, PACIFIC QUEEN FISHERIES, *et. al.*

Introductory Statement

Insurers' "Answering Brief" fails to reply to Fisheries' contentions on a point by point basis. In spite of Insurers' jumbled approach to Fisheries' presentation, our reply brief will maintain the original order established in our main brief in the belief that, if our position is to be made clear to the Court, our arguments and logic should not be fragmented.

Reply Argument

I

The Court erred in failing to conclude that Insurers had the burden of showing the source of ignition which they admit they failed to show.

Insurers attempt to by-pass *Hart-Bartlett-Sturtevant Co.* v. *Aetna Ins. Co.,* 293 S. W. 2d 913 (Sup. Ct. Utah 1956) (Insurers had burden of proving in what particular way the explosion was caused) and *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.,* 30 F. 2d 794 (8th Cir. 1929), quoted in Fisheries' main brief at page 13, by invoking the *Pennsylvania Rule,* a procedural rule predicated on statutory fault (Ins. Br., p. 67). For the purposes of argument only, we shall assume that Fisheries were guilty of a statutory fault.

Insurers' bald statement (Ins. Br., p. 67) that the roots of the *Pennsylvania Rule* "are imbedded in English marine insurance law" is absolutely incorrect. The "leading case" they cite for this proposition, *The Fenham,* (1870) L. R. 3 P. C. 212, 6 Moo. P. C. (N. S.) 501, 23 L. T. 329, was not even an insurance case, but, rather, involved a suit for damage resulting from a collision of a steamship and a brig. The words left out at the second set of asterisks in Insurers' quote are as follows:

> "* * *: that if it is proved that any vessel has not shown lights * * *"

None of several leading English texts on marine insurance consulted mentions this so-called "leading case." This marine tort rule is foreign to English insurance law, repugnant to it, is not mentioned in any English marine insurance case nor in the *Marine Insurance Act,* 1906, 6 Edw. 7, C. 41.

Insurers' then proceed to cite a large number of American collision and limitation of liability cases purporting to

illustrate application of the rule. On page 68 of their brief, they list five so-called "insurance cases" in which they say the rule has been invoked. Of these five cases, *The Denali,* 112 F. 2d 953 (9th Cir. 1940), and *The Princess Sophia,* 61 F. 2d 339 (9th Cir. 1932), are actually admiralty proceedings for the limitation of liability. *The Material Service* is listed twice for the proposition, firstly as the case in the district court and, secondly, as the case on appeal *sub nom. Leathem-Smith-Putnam Nav. Co.* v. *National U. F. Ins. Co.,* 96 F. 2d 923 (7th Cir. 1938). It should be noted that the latter case retreated from the stiff language of the District Court in that the court used the words *"did not* contribute" rather than the key *Pennsylvania Rule* language: "* * * *could not* have" contributed. The *Pennsylvania,* 19 Wall. (86 U. S.) 125, 136 (1873). (Emphasis added.)

The remaining decision cited on Insurers' list of "insurance cases" is *Richelieu and Ontario Nav. Co.* v. *Boston Marine Ins. Co.,* 136 U. S. 408 (1890), a case involving a stranding held to be causally related to violation of a Canadian Navigation Statute quoted by the Court as follows (p. 422):

> "Section seven of the Canadian Statute provides that 'in case any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this Act, such damage shall be *deemed* to have been occasioned by the *willful default* of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proved, or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary; and the owner of the vessel or raft, *in all civil proceedings,* and the master or person in charge as aforesaid, or the owner, if it appears that he was in fault, in all proceedings, civil or criminal, shall be subject to the legal consequences of such default." (Emphasis added.)

The court, in applying the *Pennsylvania Rule,* stated (pp. 422-423) :

> "In this case, *in view of* the seventh section of the Canadian Statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding. * * *" (Emphasis added.)

The application of the rule was clearly limited to the specified circumstances and no American marine insurance case since this 1890 decision has applied the strict language of the doctrine except for *The Material Service,* cited *supra,* which was modified on appeal.

In any event, it would be unfair to impose a harsh American doctrine emanating from marine tort law on assureds who have contracted for law and usage which rejects the doctrine in the field of marine insurance.

The law governing burden of proof in explosion cases, as enunciated on page 13 of Fisheries' main brief, stands unrebutted. No English cases having been found to the contrary and there being no reason to believe that the principles stated are in any way repugnant to English law and usage (Main Br., p. 12), the principles must be accepted as governing. Insurers have not even attempted to carry the burden of showing in what particular way the explosive mixture, whatever it may have consisted of, in the *Pacific Queen* was ignited.

II

The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous.

Insurers, instead of endeavoring to persuade this Court that *Pacific Queen's* explosion was fueled by gasoline, have merely adopted the Findings of Fact of the District Court on this and all factual questions in the case. (Ins. Br., p. 4). Apparently they are under the mistaken impression that Fed. R. Civ. P. No. 52(a) will pull the laboring oar for them (Ins. Br., III (D), p. 25).

Fed. R. Civ. P. No. 52(a), which is concerned with findings of fact made by the district court after trial, states, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In applying Rule 52, however, the appellate court must distinguish "between primary inferences drawn from demeanor testimony, which the trial court is best capable of making, and secondary inferences drawn from primary inferences, which theoretically the appellate court is equally able to draw." *Moore's Federal Practice,* Vol. 5, § 52.03 (1), p. 2615. Appellate courts may make their "own inferences from undisputed facts or purely documentary evidence." *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.,* 178 F. 2d 541, 548 (9th Cir. 1949). In this Circuit it is considered a "duty" to draw such inferences. *Gillette's Estate* v. *Commissioner of Internal Rev.,* 182 F. 2d 1010, 1013-1014 (9th Cir. 1950). See also: *Ashworth* v. *General Accident Fire and Life Assurance Corporation,* (1955) I. R. 268, 285.

The lower court found that the destruction of *Pacific Queen* resulted from "a gasoline explosion according to the

overwhelming preponderance of the evidence * * *" (Op., R. Vol. 1, p. 243). This finding of fact, which was more in the nature of a conclusion of fact, was based upon the following inference (Op., R. Vol. 1, pp. 242-243):

> "It is very clear, however, that there was something about the natural air circulation, and by that I mean unaided circulation, in this ship that for some reason or other brought gasoline fumes from the after reefer deck and below that area to the upper portions of the ship" [on the morning of the Friday Harbor spill]. "It is certainly a reasonable probability that exactly the same thing happened on the night of September 17."

To get into the engine room, however, it would be necessary for these fumes to pass through the watertight door on the centerline of the upper level engine room in the after watertight bulkhead between the engine room and the reefer flat. As pointed out in Fisheries' main brief at page 22, the Coast Guard found:

> "(s) The watertight door on the centerline of the upper level of the engineroom in the after water-tight bulkhead, between the engineroom and the reefer flat, was found open, partially blown off, and hanging on one hinge; the weld around the door frame was ripped from the top center of the door around to the port side of the door and approximately half way down the length of the door. The door opens aft from starboard to port" (C. G., R., Vol. 3, p. 1075).

"Report Number 2211" of Ace Diving Service (Pls. Exh. 34-1, admitted R., Vol. 1, p. 351) describes the damage to the watertight door at page 5 as follows:

> "G. M. C. diesel engine auxilliary located directly aft the forward watertight door, reefer flat, shows flame damage upper regions, also damaged by being struck

> by the door described above when it was *blown open,* this door noted as now hanging by its lower hinge, frame badly buckled." (Emphasis added.)

The initially closed condition of this key watertight door severs the theory of Insurers' expert, Mr. Knisely, which theory was adopted by the lower court (Op., R., Vol. 2, pp. 242-243, 246), that gasoline vapors were wafted up from the shaft alley recess into the forward upper part of the engine room. Mr. Knisely was asked to assume that "the doorway between the reefer flat and the upper engine room was open * * *" (R., Vol. 3, p. 683), which was, in the light of uncontroverted facts, an incorrect assumption.

It is extraordinary that Insurers have not commented in any way in their brief on the matter of this key bulkhead door which is discussed at page 22 of Fisheries' main brief. It is also to be noted that the lower court made no primary finding as to whether this door was open or closed at the time of the explosion.

III

The Court erred in failing to conclude that negligence, even of the assureds themselves, will not preclude them from recovery.

Insurers have made no effort to meet this point, other than to cite (Ins. Br., p. 59) Section 55(2) of the *Marine Insurance Act* which Fisheries had previously set out in full (Main Br., p. 24). Inferentially, it seems, they argue that this section is not applicable because the loss of *Pacific Queen* was not, they say, "proximately caused by a peril insured against."

An inspection of the policy terms (R., Vol. 1, p. 74, 82) shows coverage for "fire," perils "of the seas," and, under the Inchmaree Clause, "Explosions" and "Negligence." Cer-

tainly it cannot be argued that the loss of *Pacific Queen* was not proximately caused by one or more of these perils.

Arnould on Marine Insurance, 15th Ed., states at page 764:

> "It is clear that a loss may be proximately caused by more than one peril, that is by a combination of causes, and in this event the loss can be properly attributed to any one of such causes."

This has been said to be so, for example, when the shot of a man-of-war precipitates "overwhelming by the sea." *Leyland* v. *Norwich Union,* (1918) A. C. 350, 353.

No "wilful misconduct" having been alleged by Insurers or found by the Court, Fisheries may recover for loss of *Pacific Queen* in spite of any negligence connected with the loss.

I V

The Court erred in failing to conclude that, in any event, the loss of the *Pacific Queen* resulted from perils covered by the "Inchmaree" Clause.

Insurers' brief, at page 59, states that "want of due diligence by the owners or managers bars recovery under the Inchmaree Clause." What is "due diligence"? According to *Black's Law Dictionary,* 4th Ed., it is:

> "Such a measure of prudence, activity or assiduity, as is properly to be expected from and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

In other words, one who is duly diligent is one who pursues an object or an end without being negligent along the

way. Negligence of owners, however, is a peril covered under the "Adventures and Perils" clause of the policies (R., Vol. 1, p. 82; Main Br. pp. 24-26). The "due diligence" requirement under the Inchmaree Clause does nothing, then, to cut back the coverage of the policy as an entity.

In any event, what standard or measure of prudence, as a matter of law, should be fixed upon the concept of "due diligence" under the particular circumstances of our case. If the various provisions of the *Marine Insurance Act* are to hang together properly, this standard must be the same as that enunciated in *Cia Naviera Vascongada* v. *British & Foreign Marine Insurance Co., Ltd.,* (1936) Ll. L. Rep. 35, 58 as the measure of "privity" (Main Br., p. 44). As no *deliberate* shunning of unseaworthiness—which was not even realized, if it existed, by the owners—has been shown, the "due diligence" clause, as a matter of law, fails to provide Insurers with a defense. As the vessel had an estimated fair market value of $660,000.00 (R., Vol. 3, p. 1035), one would not expect the owners, or any of them, to "deliberately" ignore any known unseaworthiness. The lower court did not find that any of the owners did so nor has this even been alleged by Insurers.

V

The Court erred in failing to conclude that the assureds were under no obligation to disclose any circumstances presumably known to Insurers or waived by them.

Insurers (Ins. Br. p. 38) and the lower court (Op., R., Vol. 1, p. 237) have advanced the argument that there was nothing "observable" by Elkins, who held *Pacific Queen*'s 1957 survey, which would have apprised him of *Pacific Queen's* increased gasoline capacity or of the altered discharge facilities. Elkins, however, testified that he "looked over the piping" connected with the "auxilliary tanks aft"

(R., Vol. 3, p. 1206). The two forward converted diesel tanks had been relieved of their diesel line connections at the top and the fittings on the tank sides had been plugged (Buckler, R., Vol. 4, pp. 1383-1384). The significance of this must have been apparent—or at least should have been so—to Elkins who was thoroughly acquainted with Bristol Bay gillnet operations (Elkins, R., Vol. 3, pp. 1201, 1209, 1210, 1211) and who admitted that he had seen gasoline storage on other reefer vessels in the Northwest (R., Vol. 3, p. 217). In any event, Insurers knew *Pacific Queen* was carrying gasoline (Galbreath, R., Vol. 2, p. 780). The quantity carried was immaterial from a risk standpoint as Insurers' expert, Mr. Knisely, stated that two gallons of gas was all that was needed to fuel an explosion of the magnitude of that which destroyed the *Pacific Queen.*

The cases cited (Ins. Br., p. 45) by Insurers involving *classification society* surveys are not relevant. The Court's attention is also invited to the quotation from the *Leathem* case on page 43 of their brief which is one of the more gross examples of distortion of the meaning of a case, through use of omissions, substitutions and inversions, contained in Insurers' brief.

Further reply on the issue of concealment will be presented at oral argument.

VI

The Court erred in failing to conclude that the insurance is not avoided because of unseaworthiness.

Although the parties to this appeal cannot be said to have agreed to be bound by the law and usage of the Republic of Ireland, there is much learned discussion and correlation of English cases decided under the *Marine Insurance Act* in *Ashworth* v. *General Accident Fire and Life*

Assurance Corporation, (1955) I. R. 268, cited and quoted by Insurers at pages 53-54 of their brief. Black, *J.,* in a dissenting opinion, had the following to say, for instance, on the meaning of "privity" under Section 39(5) of the Act (p. 300):

> "But what does 'privity' mean? I am satisfied it means actual knowledge. Having the means of knowledge might often justify an inference of actual knowledge, but save in such a case, having the means of knowledge will not in my view, suffice. That was the position at common law. Failing to use the means of knowledge might only be negligence on the part of the shipowner, and *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.,* (1898) 2 Q. B. 114, is a clear decision that negligence, unless wilful, causing a loss by perils of the seas will not prevent the insured from recovering on his policy, even though the negligence was his own. There must be what in *Thompson* v. *Hopper,* E. B. & E. 1038, at p. 1047, Willes, J. called *dolus malus.*"

If the owners "failed to use the means of knowledge" to ascertain whether or not gasoline had impregnated the wooden members of the shaft alley recess after *Pacific Queen's* Friday Harbor spill, this would only amount to negligence, a covered peril. *Dolus malus,* where one intentionally misleads another through deception and fraud, is entirely absent from this case, not having been either alleged by Insurers or found by the lower court.

VII

The Court erred in failing to conclude that there was no violation of the Tanker Act; the Court was correct, however, in concluding that the violation it found did not render the entire adventure or voyage an illegal one.

Assuming, for the purposes of argument only, that Fisheries did violate the *Tanker Act,* 46 U. S. C. § 391a, what effect should be given to such violation with respect to the insurance covering *Pacific Queen* and her gillnetters? This question was answered, in part, by the lower court as follows (Op., R., Vol. 1, p. 293-294):

> "In the circumstances of this particular case, I find and hold that the violation of the Tanker Act in the particular circumstances now under consideration constituted negligence or a want of due care and diligence for the security of the Pacific Queen on the part of its owners, but that this *violation of positive law was of such a character and extent as not to render the entire adventure or voyage an illegal one.* The hauling of gasoline in bulk in violation of the Act was not a primary purpose of the voyage but merely an incident thereof, and in such circumstances I do not find that the entire adventure or voyage itself is to be deemed illegal * * *" (Emphasis added.)

The "negligence or a want of due care and diligence" mentioned by the lower court are, as Fisheries have already pointed out (Main Br. pp. 24-29), covered perils. Insurers now attack, however, the italicized portion of the lower court's conclusion by invoking (Ins. Br. p. 64) Section 41 of the *Marine Insurance Act* which reads as follows:

> "41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner."

Illegality, assuming there was such, "* * * was remote and distinct from the contract or only collateral and concomitant with it, or incidental, or merely precedent or subsequent, and not constituting a part of it or embracing and imbuing its stipulations." *Cunard* v. *Hyde,* (1858) E. B. & E. 670, 120 Eng. Rep. 661. (Second case (1859), 29 L. J. Q. B. 6, decided differently on ground of privity). As stated in *Arnould on Marine Insurance,* 15th Ed. at § 750, page 705, "a voyage may be legal, because justified by its object, though technically contravening the strict terms of some Order in Council."

Even if we are to assume that the *Tanker Act* was materially violated, Fisheries, not having intended such violation, may not be precluded from recovery under the policies. The test suggested in *Waugh* v. *Morris,* L. R. 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. 265, 21 W. R. 438, 1 Asp. M. C. 573, a case cited in *Chalmers Marine Insurance Act 1906*, 4th Ed., at page 58, is: Did the contracts contemplate "the very object of satisfying an illegal purpose," or were they entered into "for the express purpose of a violation of the law"? This has never been alleged by Insurers nor has it been found by the lower court (Op., R. Vol. 1, p. 245). Further authorities on the question of intent are: *Regazzoni* v. *Sethia,* (1958) A. C. 301, discussed in *Arnould on Marine Insurance,* 15th Ed. §§ 738-741. See also *Washington State Insurance Code,* R. C. W. § 48.19.090, for non-marine (Mem. Dec., R. Vol. 1, pp. 224-226) rule on intent.

The lower court's conclusion, in any event, that Fisheries had "imputed knowledge of the provisions of the Tanker Act and of applicable Coast Guard regulations" (Op., R. Vol. 1, p. 293) is in error. On August 25, 1958, the Commandant of the United States Coast Guard held that neither the *Tanker Act,* 46 U. S. C. § 391a, nor the *Dangerous Cargo Act,* 46 U. S. C. § 170 *et seq.,* "were designed to cover [The *Pacific Queen's*] type of vessel and operation which is presumably fishing * * *." (R. Vol. 3, p. 1093; Main Br. p. 48).

Prior to the loss of *Pacific Queen,* her owners were of this view and still are of this view. It would be a distortion of justice if the owners were to be deemed apprised of violation on their part of statutes which the governmental agency charged with their administration considered inapplicable to Fisheries' venture.

Insurers refer, on page 63 of their brief, to the citation by the Coast Guard of another vessel, the *Alaska Reefer,* for having violated the *Tanker Act,* and imply that this citation occurred in August of 1957. Actually, *Alaska Reefer,* was not cited until September 5, 1957 (Binns R. Vol. 4, p. 1283) and a decision and order on the matter was not handed down until October 30, 1957 (Binns, R. Vol. 4, p. 1285) which was approximately six weeks *after Pacific Queen's* explosion. Any so called "imputed knowledge" of alleged applicability of the *Tanker Act* could not have come into being, then, until after the explosion occurred.

VIII

The Court erred in concluding that Hull, Peck and Royer were partners in Pacific Queen Fisheries and that damaging admissions were made by them.

Counsel for Insurers have failed to point out a single damaging admission made by Hull, Peck or Royer, whether they be adjudged partners or something less than partners.

The extent to which counsel for Insurers went to "brainwash" a former Engineer, Peck, is interesting (R. Vol. 3, pp. 967-974). He was visited twice at his home, the second visit lasting three hours. His deposition was noticed and taken immediately thereafter and he was asked "had he not heard" or certain practices aboard the *Pacific Queen* some years after he left. Over objection of counsel to Fisheries, he admitted he had. Subpoenaed at the trial, he admitted that the only person he had heard these things from was counsel for Insurers! We had thought that such practices by insurance companies had gone out with the silk hat.

IX

The Court erred in concluding that assureds' suit against Buffalo Insurance Company is time barred.

Insurers have cited no English authority on the point and, therefore, *Phoenix Ins. Co. of Hartford* v. *De Monchy,* (1929) 45 T. L. R. 543, 35 Com. Cas. 67, quoted at page 51 of Fisheries' main brief, must be deemed conclusive and the Buffalo time bar provision must be disregarded.

X

The Court erred in denying assureds' motion for jury trial.

With respect to Fisheries' claim of error in denying its motion for a jury trial, Insurers make a number of assertions which are not borne out by the facts or the Record, which assertions are enumerated hereunder.

1. That Fisheries did not have a right to a jury trial in *P. Q. F.* v. *Symes* (2348), at the time it was removed to the District Court and consolidated for trial with *P. Q. F.* v. *Atlas* (2343), September 28, 1960.

In support of this position and before our opening brief, Insurers caused to be inserted in the printed Record certain material which was not in the Record and not in existence at the time of Judgment, without leave of the court or notice to their adversaries. This material appears on pages 51-53 of the Record and consists of an affidavit of counsel dated months after the judgment and a photostat of the Appearance Docket in State Court of *P. Q. F.* v. *Symes* (2348).

Fisheries were puzzled upon finding this material in the printed Record when it was received from the Clerk of

the Court in San Francisco. Its purpose and intent were not clear until Insurers' brief was subsequently received. Therein Insurers, for the first time, made the assertion that no demand for a jury trial had been made or filed in the State Court case. It is true that the Appearance Docket does not record the filing of the demand itself but it does record the payment of the jury fee of $12.00 on August 8, 1960, which, we submit, is probably the best evidence. It is significant, we think, that the date of August 8, 1960 is the same date that a jury was demanded in *P. Q. F.* v. *Atlas* (2343), which was already pending in the District Court. Thereafter the State Court case came on for setting before Judge Johnson on September 12, 1960, at which time Mr. Copeland and Mr. Stephan both appeared before the Court and the case was set down for a four day jury trial. The minutes of that hearing, not heretofore transcribed, and affidavit of the Judge, a photostat of his docket and the original receipt for Jury Fee of the Clerk of the Superior Court of Pierce County are submitted herewith as an additional part of the Record.

In summary on the point, counsel for Insurers had positive knowledge of Fisheries right to a jury trial in the State Court case (2348) and the approximate date of trial of that case at the time he consented to the removal of that case to the District Court for consolidation for trial with *P. Q. F.* v. *Atlas* (2343), after which the motion for a jury trial was *again* argued before the District Court.

2. That Fisheries' counsel may be properly held to an exact knowledge of and strict obedience to all the Federal Rules of Civil Procedure—and in particular, Rule 38—but that this does not apply to the District Judge with respect to Rule 81(c).

As we have heretofore detailed, a motion for a jury trial was made, argued and denied in *P. Q. F.* v. *Atlas* (2343),

wherein it was pointed out that Mr. Copeland had had no experience in Federal Court on the civil side, followed his State Court procedure and demanded a jury trial with the filing of a Reply, (wherein he denied the affirmative matter set up in Insurers' answer), all pursuant to the practice in this state. Insurers' counsel had not been prejudiced in the slightest by this short delay and none has even been alleged.

Immediately after the joinder of the two causes for trial, counsel for Fisheries reargued its demand for a jury trial and both orally and in his brief pointed out the applicability of *Beacon Theaters* v. *Westover,* 359 U. S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959), which came up on appeal from the Ninth Circuit. Whether on the question of discretion or the joinder of jury and non-jury actions for trial, we deemed this case to be controlling and strongly urged it upon the District Court. It was not mentioned in the decision denying our motion (R. Vol. 1, p. 224) and there is no evidence that it ever received the consideration we believe it deserved.

This is entirely apart from Fisheries' rights under Federal Rule 81(c) which the District Court completely ignored. It is manifestly unfair, we submit, to hold opposing lawyers to two different standards of knowledge of and conduct under the Federal Rules or for the Court to hold either lawyer to a higher standard of knowledge than the Court itself possesses.

XI

Appellants have substantially complied with the rules of this Court.

Insurers' zealous quest for an inflexible application of the Rules of this Court seems disproportionate to the gravity of the substantive issues involved in this appeal. The spurious nature of their objections will be outlined hereunder.

1. Fisheries' designation of record does not violate Rule 17(b).

This Court recently commented on the requirements of record designations in *Springer* v. *Best,* 264 F. 2d 24 (9th Cir. 1959). Footnote 2, found at pages 27-28, reads, in part, as follows:

> "In general the problem of what must be part of the record on appeal is governed by Rule 75(a) of the Fed. R. Civ. P., 28 U. S. C., which provides that 'the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record.* * *'
>
> "Because of the language of this rule, 'problems as to what portions of the record, proceedings and evidence must be designated as matters to be included in the record are not uncommon. These problems must necessarily be solved in the light of the circumstances of the particular case in which they arise, keeping in mind that Rule 75 (e) requires the omission of inessential matters but that the record on appeal must include all matters which are essential to a determination of the questions raised on appeal' " (Citations omitted).

Owing to errors inherent in the lower court's opinion, findings and conclusions, Fisheries, with an eye to economy, kept its designation of portions of the trial transcript to be printed down to about 300 pages. Not only, however, were all of the voluminous exhibits designated to be contained "in the original" in the record on appeal, but the key deposition of surveyor Elkins (R. Vol. 3, pp. 1171-1225) was specified for printing along with parts of the trial transcript.

In any event, Insurers' counsel, under the section of this Court's Rule 17 (b) which permits a counter-designation of "* * * additional parts of the record which he thinks material," filled in the record where he felt it prudent to do so. His designation included the "entire Transcript of Proceedings in the above entitled actions".

Even if Fisheries' designation was inadequate, which we deny, "irregularity" in the designation of the record by an appellant is not a proper ground for dismissal of an appeal when the "irregularity" has been cured by the appellee. *Grand Lodge, Etc.* v. *Eureka Lodge No. 5, Etc.,* 114 F. 2d 46 (4th Cir. 1940).

2. Fisheries' main brief substantially complies with this Court's Rule 18(2)(d).

In order to apprise appellees fully of contentions Fisheries intended to urge on appeal, Fisheries' counsel set out Appellants' "Points" (R. Vol. 1, pp. 297a-297h) in great detail. This was done to preclude surprise and to facilitate Insurers' counter-designation of record. Under Appellees' interpretation of the rules of this Court, however, Appellants would be penalized for an endeavor to present a complex case coherently and succinctly on brief. It is doubted that these rules are intended to deprive counsel on brief of all discretion with respect to format or to prohibit them from tailoring their brief in such a way that the pivotal of multifarious issues are highlighted and presented with clarity.

Rather than becloud the key issues of fact and law with a long listing of errors, some of which are relatively collateral, Appellants have emphasized the ultimate errors in their brief by numbering and stating them in bold print in the subject index and again as headings to each point of argument. Objections by appellees in similar circumstances have been overruled by this Court. *Simons* v. *Davidson Brick Co.,* 106 F. 2d 518 (9th Cir. 1939) ; *Monaghan* v. *Hill,* 140 F. 2d 31 (9th Cir. 1944).

Thys Company v. *Anglo California National Bank,* 219 F. 2d 131 (9th Cir. 1955), cert. den. 349 U. S. 946 (1955), reh. den. 350 U. S. 855 (1955), cited by Insurers at pages 32 and 33 of their brief, was a patent infringement case in which this Court castigated appellants—and we think rightly so—for submitting briefs which were in "almost complete disregard" of the rules of Court (p. 132).

In *Everest & Jennings, Inc.* v. *E. & J. Manufacturing Co.,* 263 F. 2d 254 (9th Cir. 1958), cert. den. 360 U. S. 902 (1959), cited at page 33 of Insurers' brief, the Court did not consider errors specified in the record which were not also set out and argued in the brief. Appellants herein feel that the Court need go no further than to consider the ultimate errors numbered, set out and argued in their brief.

In *Peck* v. *Shell Oil Co.,* 142 F. 2d 141 (9th Cir. 1944), cited by Insurers' brief at page 34, only those points with respect to which "no argument or discussion" was presented in appellants' opening brief were deemed abandoned and were not considered by this Court (p. 143).

As a convenience to the Court, Appendix I of this reply brief sets out our Statement of Points (Specification of Errors) with cross-references to the lower court's opinions, findings, conclusions and to Fisheries' main brief.

3. Appellants' non-compliance with this Court's Rule 18(2)(f) was a non-prejudicial technical failure which has been cured.

Leading counsel for Fisheries obtained two sample Ninth Circuit briefs which were used, in part, as format guides for Fisheries' main brief. Neither of these briefs contained a table of exhibits. We supposed no such table was required where no evidentiary questions were involved. In any event, the irregularity, if it is to be considered such, has been cured in Insurers' brief and could have been cured in this reply brief.

Brandow v. *United States,* 268 F. 2d 559 (9th Cir. 1959), cited by Insurers' brief at page 34, turned on an evidentiary question—whether or not a recording had been properly admitted as an exhibit. We have no evidentiary questions in the *Pacific Queen* case. Furthermore, noncompliance with Local Rule 18 (2) (f) was not the ground upon which the lower court's decision was affirmed.

Medak's police statement (Exh. No. 4 to trial Exh. No. 391) was, Insurers' contention notwithstanding (Ins. Br., p. 34), admitted into evidence (R. Vol. 2, p. 610). When a second copy of it was offered, this second copy was rejected (Transcript, p. 1508).

Morrison v. *Texas Company,* 289 F. 2d 382 (7th Cir. 1961), cited at page 34 of Insurers' brief, has no relevance to their contentions other than to affirm that "appeals should be decided, if at all possible, on the merits" (p. 385), a general proposition with which we fully agree. See also: *Palmer* v. *Miller,* 145 F. 2d 926 (8th Cir., 1944) (technical failure without prejudice).

Conclusion

Although no one can say with certainty what blew up the *Pacific Queen,* we know that its explosion is not traceable, under any interpretation of the evidence, to the Friday Harbor spill. Even if it were, the assureds were guilty of no wilful misconduct and must be paid their insurance proceeds which have been withheld by Insurers with no valid cause.

Judgment should be reversed and entered for Appellants together with interest, their costs and disbursements, and attorneys' fees.

Dated: April 24, 1962
New York, New York

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APPENDIX

Appendix I

Statement of Points (Specification of Errors) and Cross-References

The following listed points on appeal may also be found at pages 297a-297h of Volume 1 of the Record. With indicated exceptions, they have been incorporated by reference under "Specification of Errors" at page 11 of Appellants' main brief.

1. (This error is no longer considered germane to this appeal).

2. The Court erred in denying plaintiffs' motion for jury trial on September 28, 1960.

(a) Memorandum Decision, R. Vol. 1, p. 224

(b) Finding of Fact No. III, R. Vol. 1, p. 251

(c) Appellants' Main Brief, pp. 52-55

3. (This contention has not been pressed on appeal).

4. The Court erred in finding that the increased gasoline capacity of the Pacific Queen was not made at a time or under circumstances such as to bring the increase to the actual or constructive notice of the Underwriters.

(a) Opinion, R. Vol. 1, p. 237

(b) Finding of Fact No. X(B), R. Vol. 1, p. 261

(c) Appellants' Main Brief, pp. 4-5-30-39

5. The Court's finding that there was an increase in the risk by reason of the increase in the gasoline capacity is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 235

(b) Finding of Fact No. IX(C), R. Vol. 1, p. 260

(c) Appellants' Main Brief, pp. 30-39 (Increase in risk assumed for purposes of argument only)

6. The Court's finding that neither Marquat nor Elkins was put on notice of the increased gasoline capacity or of the facilities for discharging gasoline at the time of their respective surveys is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 237

(b) Findings of Fact Nos. X(D) and (E), R. Vol. 1, p. 262

(c) Appellants' Main Brief, pp. 4-5, 30-39

7. The Court's finding that Pacific Queen was unseaworthy when she left for Alaska in 1957 is clearly erroneous.

(a) Opinion, R. Vol. 1, pp. 238-239

(b) Finding of Fact XI(A), R. Vol. 1, pp. 264-265

(c) Appellants' Main Brief, pp. 30-39, 40 (Unseaworthiness assumed for purposes of argument only)

8.. The Court's finding that Pacific Queen was unseaworthy after the Friday Harbor spill had been dealt with by shipboard personnel is clearly erroneous.

(a) Opinion, R. Vol. 1, pp. 238-239

(b) Findings of Fact Nos. XI(E), (F) and (G), R. Vol. 1, pp. 267-268

(c) Appellants' Main Brief, pp. 7, 40-45 (Unseaworthiness assumed for purposes of argument only)

9. The Court's finding that duly diligent measures were not taken to purge the spilled gasoline after the Friday Harbor spill is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 241

(b) Finding of Fact No. XI(C), R. Vol. 1, pp. 265-266

(c) Appellants' Main Brief, p. 7 (Inadequacy of purging efforts assumed for the purposes of argument only, pp. 26-27)

10. The Court's finding that it is a "reasonable probability" that unaided air circulation brought gasoline fumes from the after reefer deck and below that area to the upper portions of the ship at the time of the explosion is clearly erroneous.

(a) Opinion, R. Vol. 1, pp. 242-243

(b) Finding of Fact XII(H), R. Vol. 1, pp. 271-272

(c) Appellants' Main Brief, pp. 21-23

11. The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 244

(b) Finding of Fact No. VI, R. Vol. 1, p. 253; Finding of Fact No. XII, R. Vol. 1, pp. 268-272

(c) Appellants' Main Brief, pp. 17-23

12. The Court's finding that there was no fire in Pacific Queen preceeding the explosion is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 243

(b) Finding of Fact No. XII(C), R. Vol. 1, p. 269

(c) Appellants' Main Brief, pp. 19-20, 23

13. The Court erred in finding that the plaintiffs did not use due diligence to prevent the loss of Pacific Queen by explosion.

(a) Opinion, R. Vol. 1, pp. 244-245

(b) Finding of Fact No. XIII, R. Vol. 1, pp. 272-274

(c) Appellants' Main Brief, pp. 26-30

14. (This contention has not been pressed on appeal).

15. The Court erred in concluding that the policies were void, ab initio because of owners' concealment.

(a) Opinion, R. Vol. 1, p. 292

(b) Conclusion of Law No. IV, R. Vol. 1, p. 280-281

(c) Appellants' Main Brief, pp. 30-39

16. The Court erred in concluding that plaintiffs violated a statutory warranty of seaworthiness.

(a) Opinion, R. Vol. 1, pp. 292-293

(b) Conclusion of Law No. V, R. Vol. 1, pp. 281-282

(c) Appellants' Main Brief, pp. 40-45

17. The Court erred in concluding that the loss of Pacific Queen did not occur from and was not due to an agreed peril stated in the Inchmaree clause.

(a) Opinion, R. Vol. 1, p. 293

(b) Conclusion of Law No. VI, R. Vol. 1, pp. 282-283

(c) Appellants' Main Brief, pp. 26-30

18 The Court erred in concluding that the Tanker Act is applicable.

(a) Opinion, R. Vol. 1, p. 293

(b) Conclusion of Law No. VII, R. Vol. 1, pp. 283-284

(c) Appellants' Main Brief, p. 45 (Assumed for the purposes of argument only).

19. The Court erred in concluding that the plaintiffs had imputed knowledge of the provisions of the Tanker Act.

(a) Opinion, R. Vol. 1, p. 293

(b) Conclusion of Law No. VIII, R. Vol. 1, p. 284

(c) Appellants' Main Brief, pp. 45-49 (Not briefed as no violation of Tanker Act is admitted; briefed in Reply Brief).

20. The Court erred in concluding that Hull, Peck and Royer were Partners in Pacific Queen Fisheries at the time of the loss, are necessary parties plaintiff to this action, and that they made damaging admissions binding plaintiff, Pacific Queen Fisheries.

(a) Opinion, R. Vol. 1, p. 294

(b) Conclusion of Law No. X, R. Vol. 1, pp. 285-286

(c) Appellants' Main Brief, pp. 48-49

21. The Court erred in concluding that the liability of defendant Buffalo Insurance Company is in any event barred by the time of suit clause.

(a) Opinion, R. Vol. 1, p. 294

(b) Conclusion of Law No. XI, R. Vol. 1, pp. 286-287

(c) Appellants' Main Brief, pp. 50-52

22. The Court erred in concluding that Pacific Queen was repeatedly sent to sea in an unseaworthy state with the privity of the owners.

(a) Finding of Fact No. XI, R. Vol. 1, pp. 264-268

(b) Appellants' Main Brief, pp. 41-42

23. The Court erred in concluding that a gasoline explosion by accidental source was reasonably foreseeable by the owners of Pacific Queen.

(a) Finding of Fact No. XVIII, R. Vol. 1, pp. 277-278

(b) Appellants' Main Brief, pp. 21-23

24. The Court erred in not applying much of the English law cited in the briefs after it had made the determination that English law and usage was to be controlling. In particular, the Court entirely overlooked a key English case, Cia Naviera Vascondaga v. British & Foreign Marine Insurance Co., Ltd., (1936) Ll. L. Rep. 35, and nowhere mentioned it by name or import in its opinions.

(a) Appellants' Main Brief, p. 45

25. The Court erred in failing to conclude that it must be conclusively presumed that Underwriters' knew Pacific Queen's method of gasoline storage and handling.

(a) Appellants' Main Brief, p. 30 (Point was fully briefed for trial judge).

26. The Court erred in failing to conclude that Underwriters waived disclosure of Pacific Queen's methods of gasoline storage and handling.

(a) Appellants' Main Brief, p. 36 (Point was fully briefed for trial judge)

27. The Court erred in failing to conclude that plaintiffs were under no obligation to disclose any circumstances presumably known to Underwriters or waived by them.

(a) Appellants' Main Brief, p. 30 (Point was fully briefed for trial judge)

28. The Court erred in failing to conclude that there is no implied warranty of seaworthiness in this case.

(a) Appellants' Main Brief, p. 40 (Point was fully briefed for trial judge)

29. The Court erred in failing to conclude that the assureds did not send Pacific Queen to sea after the Friday Harbor gasoline spill.

(a) Appellants' Main Brief, p. 41 (Point was fully briefed for trial judge)

30. The Court erred in failing to conclude that the mere omission to take precautions against the ship being unseaworthy does not make the owners privy to any unseaworthiness which such precautions might have disclosed.

(a) Appellants' Main Brief, p. 43 (Point was fully briefed for trial judge)

31. The Court erred in failing to conclude that to be held privy to any unseaworthness which such precautions might have disclosed, it is the English rule that it must be found that Mardesich deliberately refrained from an examination which might have revealed that the gasoline which spilled at Friday Harbor soaked and impregnated parts of the wooden area of the ship.

(a) Appellants' Main Brief, pp. 44-45 (Point was fully briefed for trial judge)

32. The Court erred in failing to conclude that the insurance is not avoided because of unseaworthniess.

(a) Appellants' Main Brief, p. 40 (Point was fully briefed for trial judge)

33. The Court erred in failing to conclude that any negligence in purging Pacific Queen of the effects of the Friday

Harbor gasoline spill is covered by the "Inchmaree" clause. clause.

(a) Appellants' Main Brief, p. 28 (Point was fully briefed for trial judge)

34. The Court erred in failing to conclude that Pacific Queen's explosion is covered by the "Inchmaree" clause.

(a) Appellants' Main Brief, p. 30 (Point was fully briefed for trial judge)

35. The Court erred in failing to conclude that the loss of Pacific Queen resulted from perils covered by the "Inchmaree" clause.

(a) Appellants' Main Brief, p. 26 (Point was fully briefed for trial judge)

36. The Court erred in failing to conclude that even if the "Inchmaree" clause was not incorporated in the policies, negligence is still a covered peril.

(a) Appellants' Main Brief, p. 24 (Point was fully briefed for trial judge)

37. The Court erred in failing to conclude that under general perils of the seas coverage, the rule is that negligence, whether or not gross, but for which the accident would not have occurred, will not serve as a defense for Underwriters; and that only wilful misconduct, measuring up to knavery or design will suffice as a defense.

(a) Appellants' Main Brief, p. 25 (Point was fully briefed for trial judge)

38. The Court erred in failing to conclude that defendants have the burden of showing the source of ignition and of precluding the possibility of any outside unforeseeable intervening act of a third person as an igniting agent.

(a) Appellants' Main Brief, pp. 13-17 (Point was fully briefed for trial judge)

39. The Court erred in failing to conclude that fishing vessels are exempt from the terms of the Tanker Act.

(a) Appellants' Main Brief, p. 48 (Point was fully briefed for trial judge)

40. The Court erred in failing to conclude that there was no violation of the Tanker Act by the owners of Pacific Queen.

(a) Appellants' Main Brief, p. 45 (Point was fully briefed for trial judge)

41 The Court erred in failing to conclude that Hull, Peck and Royer were not partners in Pacific Queen Fisheries at the time of the loss, are not necessary parties to this action and that they made no damaging admissions.

(a) Appellants' Main Brief, pp. 48-49 (Point was briefed for trial judge)

42. The Court erred in failing to conclude that the Buffalo policy never became operative.

(a) Appellants' Main Brief, p. 50 (Point was fully briefed for trial judge)

43. The Court erred in failing to conclude that the terms of the insurance contract effected with Buffalo Insurance Company are embodied in the certificates of insurance issued by Hansen & Rowland, Inc.

(a) Appellants' Main Brief, p. 50 (Point was fully briefed for trial judge)

44. The Court erred in failing to conclude that plaintiffs' suit against Buffalo Insurance Company is not time barred.

(a) Appellants' Main Brief, pp. 50-52 (Point was fully briefed for trial judge)

45. The Court erred in failing to conclude that valid certificates of insurance were issued by defendants to plaintiffs and were in full force and effect at the time of the loss.

(a) Appellants' Main Brief, pp. 2, 5, 6, 50, 55 (Point was briefed for trial judge)

46. The Court erred in failing to conclude that plaintiffs have fulfilled all the terms and conditions of the contracts of insurance on their part to be performed.

(a) Appellants' Main Brief, pp. 2, 5, 6, 30-36, 55 (Point was briefed for trial judge)

47. (As no law has been found on this point, it is not pressed on appeal).

48. The Court erred in failing to conclude that the entire loss, as proved and agreed as to amount, should be paid by Underwriters to plaintiffs, together with interest from the date of loss and the costs of this action.

(a) Appellants' Main Brief, pp. 2, 55 (This is the point of the actions)